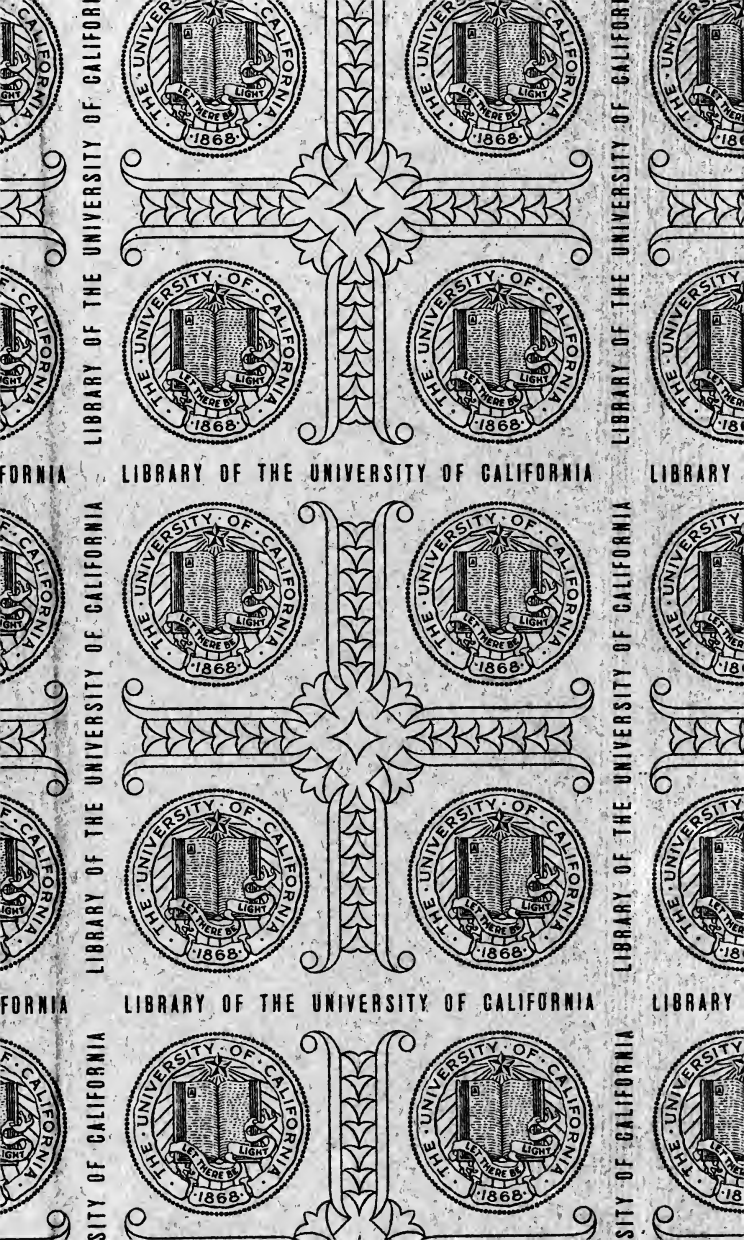


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SHAKESPEARE'S LAW



SHAKESPEARE'S LAW

BY
SIR GEORGE GREENWOOD
OF THE MIDDLE TEMPLE,
BARRISTER-AT-LAW

EDWIN VALENTINE MITCHELL
HARTFORD, CONNECTICUT

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ADDITIONAL

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ADDENDA.

p. 18. "Statutes." Since the following pages were in print, a writer in the *Times Literary Supplement* of June 25, 1920, has brought to our notice an instructive example of the use of this word, where it certainly does not "import a legislative Act." The "Statutes" of the Ewelme Almshouse (built before 1450) "run in the names of William de la Pole, Duke of Suffolk, and Alice his wife." But such use of the word was, and is, of course, extremely common.

p. 27, l. 26. "Let there be covenants drawn between us," etc. In Boccaccio's story (The ninth Novel of the second day of the *Decameron*) we read: "The two persons concerned were so resolutely bent on their purpose that all dissuasions were ineffectual, and an Obligation in writing being drawn up, they both signed and sealed it in the presence of their companions" (Mrs. Lennox's translation). It will be seen how closely Shakespeare follows his Italian model here.

PLAYS REFERRED TO ON LEGAL POINTS

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FOREWORD

WHEN this essay was completed it occurred to me that it might, possibly, find a place in a certain Legal Magazine, which shall be nameless. I therefore wrote to a distinguished lawyer who had for some years edited the Journal in question, and with whom I happened to be acquainted, asking if I might be permitted to submit my paper for his consideration. He replied that he had recently resigned the editorship, but that he had forwarded my letter to the new editor, and subsequently that gentleman, who was entirely unknown to me, was good enough to write that he was "willing to consider" my article. Thereupon I forwarded it to him, but he shortly returned it to me saying that it was "unsuitable."

Now if he had stopped there I should, of course, have had nothing further to say. An editor is master of the situation, and if he decides to reject a proposed contribution it is extremely foolish to quarrel with his decision. Nor was I, in truth, greatly perturbed by it. Unfortunately, however, this gentleman did *not* stop there. He proceeded to lecture me, *de haut en bas*, in a style which, speaking from a long experience, I venture to say that editors are not in the habit of employing in such a case. On the contrary, I believe, and I sincerely hope, that this gentleman's editorial methods are unique. As I have already said, he was an entire stranger to me. I had never met him, nor

had I ever heard of him, and the Law List gave me no information concerning him except that, judging from the date of his call to the Bar, I gathered that he is a very considerably younger man than I am. And this is the style in which he thought it becoming to address a septuagenarian member of his profession, an entire stranger to him, who had, in an evil hour, been induced to submit an essay for his editorial consideration. He commenced by politely informing me that my article contains "a couple of howlers"! Now if he imagined that he had discovered two mistakes in my essay, and had, with due courtesy, drawn my attention to them, I should, if his criticism had appeared to be just, have been grateful for his correction, and if he had been an intimate friend I should not have taken any exception whatever to the familiar epithet employed to designate them. But for this stranger editor to write to me that I had been guilty of "howlers" appeared to me to indicate that, whatever else he might be a judge of, he is not exactly qualified to act as *arbiter elegantiarum*; in fact, that his manners are far from having that repose which stamps the caste of *Vere de Vere*!

And what were the "howlers" of which he asserted I had been guilty? Well, first, I state in my essay (see p. 31) that "no lawyer needs to be told that 'fines' and 'recoveries' were collusive actions." But, says the editor of this Legal Periodical, "a fine was *not* a collusive action." Here then is "howler" number one!

Now I should be quite content to leave this very remarkable assertion—viz., that "a fine was not a collusive action"—to any lawyer who has ever paid attention to the old law relating to "fines" and "recoveries." Moreover, it is quite unnecessary to refer to well-known authorities with regard to it, for I happen to have before me a very interesting pamphlet, entitled *The Line of Least Resistance*, by Mr.

Arthur Underhill, LL.D., Bencher of Lincoln's Inn, and Senior Conveyancing Counsel to the Court, from which I will quote but two sentences :—" The Statute *Quia Emptores* made freehold tenancies in fee-simple aleable free from the rights of the vendor's heir, although, curiously enough, subject to his widow's right to dower. . . . This right was ultimately able to be barred by a *collusive action called a fine* " (p. 11). I do not think I need say more on this matter, though quite possibly my omniscient editor will retort that Mr. Arthur Underhill has been guilty of a " howler." I hardly think, however, that even his self-sufficiency will carry him quite so far as that.¹

As to " howler " number two, it was a mere matter of misapprehension of my meaning, and I need not now waste words upon it. But let us see what follows.

Speaking not as a matter of opinion, but *ex cathedrâ*, from his editorial chair, as though making an infallible pronouncement, this pontifical lecturer tells me that Shakespeare " wrote of law as a dramatist, and in every one of the instances that can be quoted there

¹ Amongst other authorities, I might mention the *Encyclopaedia of the Laws of England*, where " Fines " are described as " collusive actions." In other places they are called " fictitious " actions, as (e.g.) in Williams on the *Law of Real Property* : " Fines were fictitious suits commenced and then compromised by leave of the Court, whereby the lands in question were acknowledged to be the right of one of the parties " (12th Edn., p. 230). It is hardly necessary to say that the word " collusive " does not necessarily connote fraud, or deceit. As we read in *Termes de la Ley*, " Collusion is where an action is brought against another by his own agreement." If both plaintiff and defendant agree to bring an action with a common object, that is a " collusive action." As my editorial mentor himself admits, " Recoveries " were " collusive actions," but, like " fines," they were recognized and approved methods of dealing with land in certain cases, and no suggestion of fraud or deceit attached to them.

is not a single case in which he has not misapplied the technical expressions, or in which a lawyer would not have omitted them " !

This is really magnificent. The question of Shakespeare's legal knowledge is thus settled for all time by this gentleman's *ipse dixit*. There is, in fact, no question to be discussed. All the lawyers whose opinions I have cited in the following essay, and who in their time held high place in their profession, may be dismissed as poor ignorant simpletons whose judgment in this matter is not worth the paper it is written on. We may, therefore, spare ourselves the trouble of making any further inquiry as to our great poet's knowledge of law. "I am Sir Oracle," says Mr. Editor, and "when I speak let no dog bark" !. The only objection to this view of the case is that, so far as I can ascertain, this gentleman speaks with no authority except that which comes from self-assertion. I cannot learn that he is a gentleman of any particular distinction in his profession, or that he possesses any qualifications which entitle him to claim any particular value for his opinion. Let us see how he comments on the words of Mrs. Page, in the *Merry Wives*, to which Lord Campbell has drawn attention, and which I have discussed at p. 30 of the following paper. "If the devil have him not in fee-simple, with fine and recovery," says the Merry Wife, with reference to Falstaff, "he will never, I think, in the way of waste attempt us again." Now listen to the illuminating criticisms of the very learned lawyer (*soi-disant*) who occupies the exalted position of editor of a certain Legal Journal. Here it is. "The devil could not have Falstaff in fee simple, but could only have an estate *pour autre vie*. Again, as waste could only be enjoyed by freehold tenants of a manor by grant (actual or presumed), there would be a suggestion to a lawyer that Ford and Page were pimps. The analogy of a copyhold tenant's claim

to waste would be too far-fetched for a lawyer to consider it for a moment."

Now I would beg the reader to refer once more to the delightful passage in Shakespeare's play to which all this refers, and then to ask himself whether in the whole range of Shakespearean commentary he can point out a more entirely futile and absurd pronouncement, or one that shows such an entire lack of appreciation of comedy, than this portentously pedantic display of absurdly misapplied learning, if learning indeed it be! What the train of reasoning is that would induce "a lawyer" (save the mark!) to discover in Mrs. Page's words "a suggestion that Ford and Page were pimps," I thank Heaven—though I used to call myself "a lawyer"—I have not the least idea.

But, unfortunately, our legal lecturer descends to still lower depths. I have pointed out in the following essay (p. 28) that the critics who think they have detected "bad law" in Shakespeare's play *All's Well that Ends Well*, are mistaken, because, although a guardian was not entitled to insist that his ward should marry a lady of inferior rank, as was Helena's position with regard to Bertram, yet the King of France was no ordinary guardian, seeing that he had the power to raise the lady to a rank as high as that of his ward, and had actually undertaken so to do. Now hear the comment of my editorial mentor upon this. "I must say," he writes, "that *I do not appreciate your suggestion that a king could, by ennobling a strumpet, make her a suitable match for his ward*"! I commend this charming piece of legal and literary criticism to all lovers of Shakespeare, lawyers or laymen; I commend it to all who have ears to hear, heads to appreciate, and hearts capable of righteous indignation. Helena, according to Coleridge—no mean critic—is Shakespeare's "loveliest creation." Concerning Helena Mrs. Jameson writes :

"There never was, perhaps, a more beautiful picture of a woman's love . . . patient and hopeful, strong in its own intensity, and sustained by its own fond faith . . . the beauty of the character is made to triumph over all."

Such is Helena to Coleridge and Mrs. Jameson. Such I should have thought she would be to all men and women sufficiently educated to read Shakespeare's play, and who are possessed of wholesome and decently constituted minds. But to him who from his editorial chair sends me this unsolicited, this entirely gratuitous—may I not say this extremely impertinent?—written harangue, Helena is "*a strumpet*"!

Well, well. There I am content to leave it. Such are now, it seems, the self-constituted Judges who preside over the Courts of English Literature. I know, of course, and know only too well, that a "Great Taboo," as a recent writer has styled it, has been established against those who venture to suggest that, possibly, the name "Shake-Speare" was a mask-name under which some great man, other than he who came from Stratford-on-Avon, was able to write while preserving his own anonymity. I know that the Highbrows of English Literature will not deign even to mention, still less to admit, any discussion of an hypothesis which is so shocking to their tender sensibilities; I know that, as a distinguished French scholar has said, "*L'hétérodoxie dans ce domaine a paru jusqu'à présent aux maîtres des universités et aux érudits, une opinion de mauvais goût, téméraire et malseante, dont la science patentée n'avait pas à s'occuper, sauf pour la condamner.*"¹ I myself, although I yield to none in my admiration of Shakespeare's works, have been called a "Defamer

¹ *Sous le Masque de "William Shakespeare"*; by Abel Lefranc, Professeur au Collège de France, Vol. I. p. 20.

of Shakespeare," because, after many years' thought and study of the subject, I find I am constrained to hold this "heterodox" opinion concerning the authorship of those works. But to write of one of Shakespeare's most beautiful characters that she is "a strumpet," *that*, of course, is not to "defame Shakespeare," provided you are sound on the true Stratfordian Faith. And it is before such Judges that we poor heretics have to be tried! It is true that there is nothing at all "heretical" in the following essay. It might have been written by the most "orthodox" of "Stratfordians." Aye, but my antecedents are, of course, known. I come before the Court as a suspect character. Nay, more, I am marked out as a subject of the "Great Taboo"!

Well, we must e'en bear it as best we may. *Magna est Veritas et praevalabit*—some day perhaps!

G. G.

SHAKESPEARE'S LAW

IN the year 1859, Lord Campbell, who in that year became Lord Chancellor, having previously (in 1850) been Lord Chief Justice of the Queen's Bench,¹ published a book in the form of a letter to Mr. Payne Collier, entitled *Shakespeare's Legal Acquirements*, in which he contended that Shakespeare had "a deep technical knowledge of the law," and an easy familiarity with "some of the most abstruse proceedings in English jurisprudence." With regard to the poet's "judicial phrases and forensic allusions" he writes: "I am amazed, not only by their number, but by the accuracy and propriety with which they are uniformly introduced." And on the question as to the means by which Shakespeare could have acquired all this legal knowledge, he expresses himself as strongly inclining to the hypothesis that the dramatist had studied law in an attorney's office.

Lord Campbell's great experience as a lawyer, and the high position which he held in the legal profession, naturally led to a very general acceptance of his opinion on this matter of Shakespeare's knowledge of law, and that opinion has been too frequently cited as a conclusive authority on the question by writers who have not taken the trouble, or

¹ We now speak of "The Lord Chief Justice of England," but that title dates only from the year 1875, although Coke had tried to assume it, and was informed, when he was dismissed in the year of Shakespeare's death, that he had incurred the displeasure of the King by so doing. Upon this matter we read in the modern *Encyclopaedia of the Laws of England*: "Shakespeare, ever accurate in his legal terminology, styles Gascoigne, C. J., 'Lord Chief Justice of the King's Bench,' in the *dramatis personæ* of 'King Henry IV. Part 2.'" (Italics mine.)

who have not been competent, to examine the arguments upon which it is founded.

Now Lord Campbell had been anticipated in this inquiry by a learned barrister of Gray's Inn, to wit Mr. William Lowes Rushton, who in August, 1858, a year before the issue of Lord Campbell's book, had published a little work called *Shakespeare a Lawyer*, in which he also adduced arguments well worthy of consideration in support of the contention that Shakespeare had an accurate knowledge of law, and this author subsequently complained, and it appears not without justice, that the Lord Chancellor had made use of his work, but had omitted to make reference to the source upon which he had drawn. "It is well known," wrote a writer in one of the newspapers of that day,¹ "that Lord Campbell, some time afterwards, published a similar work, availing himself, without acknowledgment, of Mr. Rushton's labours, as the *Examiner* conclusively pointed out."

Mr. Rushton's book has become scarce, and it is now very difficult to obtain a copy of it, but he subsequently published two little brochures on the same subject, viz.: *Shakespeare's Testamentary Language* (1869) and *Shakespeare's Legal Maxims* (1907), both of which, but especially the former, will be found well worthy of study. In both he takes note that Lord Campbell himself, in the work mentioned, has made several mistakes in law, and he makes use of that fact to warn the reader of the danger there is in concluding that Shakespeare was no lawyer because, it may be, he also has been guilty of some mistakes of the same kind. For if that argument

¹ *The Liverpool Albion*. Mr. Rushton was closely connected with Liverpool. We may notice that Lord Campbell's letter to Payne Collier bears date, in his book, September 15, 1858, though the book itself was not published till 1859. Mr. Rushton's book was published in the first week of August, 1858.

is to prevail it can be equally well proved that Lord Campbell himself was no lawyer, or, to use Sir Sidney Lee's expression (*infra* p. 17), had had no "technical experience." *Quod est absurdum*.¹ But, asks Mr. Rushton, "Is there a barrister or a solicitor in large practice, or a judge on the bench, who can say with truth, 'I never made a mistake in law'?"

The question then is, Does Shakespeare, although, possibly, he may be found to be at fault here and there, show by his plays and poems such a general knowledge of law, and legal principles, and such an exceptional familiarity with legal procedure, and the ways and habits of lawyers, as force us to conclude that either he was himself a lawyer, or had, at any rate, received, somehow and somewhere, a sound legal education?

And here, before passing on, it may be well to mention that long before the days of Rushton and Campbell, one of the acutest, most learned, and most distinguished of Shakespearean critics, Malone to wit, himself a lawyer of no mean authority, had written of Shakespeare: "His knowledge and application of legal terms seems to me not merely such as might be acquired by the casual observation of even his all-comprehending mind; it has the appearance of technical skill."²

Another lawyer, and well-known Shakespearean, Richard Grant White, has written: "No dramatist of the time, not even Beaumont, who was a younger son of a judge of the Common Pleas, and who, after studying in the Inns of Court, abandoned law for the drama, used legal phrases with Shakespeare's readiness and exactness . . . legal phrases flow from his pen as part of his vocabulary and parcel of his thought."

¹ I would recommend those who are inclined to sneer at Lord Campbell's authority as a lawyer to read Mr. G. P. Macdonell's article on him in the *Dict. Nat. Biog.*

² *Boswell's Malone* (1821), Vol. ii. p. 108.

Yet another learned lawyer, the late Mr. E. T. Castle, K.C., has borne testimony to the accuracy of Shakespeare's legal knowledge, and lays stress on his "familiarity with the habits and thoughts of counsel learned in the law."

I might further cite the opinions of Lord Penzance, Judge Webb, and Judge Holmes of the Supreme Court of the United States, but as these were supporters of the "Baconian" theory it may perhaps be better not to call them as witnesses in the case.¹

Turning now to lay writers, it is interesting to note that that highly distinguished critic, George Steevens, who, as Sir Sidney Lee writes, "made invaluable contributions to Shakespearean study," and whose edition of the poet, published in 1773, was "long regarded as the standard version," expressed himself as in agreement with Malone's estimate of Shakespeare's legal knowledge; and one may add that Charles and Mary Cowden Clarke, whose names will ever be remembered in the history of Shakespearean bibliography, spoke of "the marvellous intimacy which he displays with legal terms, his frequent adoption of them in illustration, and his curious technical knowledge of their form and force." Professor Churton Collins, also, has written of Shakespeare's "minute and undeviating accuracy in a subject where no layman who has indulged in such copious and ostentatious display of legal technicalities has ever yet succeeded in keeping himself from tripping."

If then appeal is to be made to authority on this matter, one could point to a formidable body of

¹ Mr. Castle was not altogether "orthodox." He entertained the curious idea that Shakespeare and Bacon collaborated in what he calls "the Legal Plays." See *Shakespeare Bacon, Jonson, and Greene*, by E. T. Castle, K.C. Lord Penzance's legal competence no one, I apprehend, will be found to question.

opinion in support of the proposition that the works of Shakespeare prove that their author must have been exceptionally well equipped with legal knowledge; and, in accordance therewith, we find Sir Sidney Lee, in the earlier editions of *A Life of William Shakespeare*, making mention of "Shakespeare's accurate use of legal terms which deserves all the attention that has been paid it."¹ Since those editions were published, however, it appears that Sir Sidney has changed his views on the subject, for he now writes: "The poet's legal knowledge is a mingled skein of accuracy and inaccuracy, and the errors are far too numerous and important to justify on sober inquiry the plea of technical experience [*sic*]."² No judicious reader of *The Merchant of Venice* or *Measure for Measure* can fail to detect a radical unsoundness in Shakespeare's interpretation alike of elementary legal principles and of legal procedure." And in a note, after expressing his opinion that Lord Campbell "greatly exaggerated Shakespeare's legal knowledge," he refers us to *Notes on the Bacon Shakespeare Question* by Charles Allen (Boston, 1900), as showing "the true state of the case," and more particularly to ch. vii. of that work, on "Bad Law in Shakespeare," which he informs the reader "is especially noteworthy."³

Now were I to attempt to make a survey of Shakespeare's plays and poems with the object of testing the truth of Sir Sidney Lee's assertion that the great

¹ I quote from the Illustrated Library Edition (1899) p. 30.

² How "errors" could possibly "justify a plea of experience" is beyond the limit of my very ordinary intelligence.

³ *A Life of Shakespeare* (1915), p. 43. He further refers to Mr. J. M. Robertson's *Baconian Heresy* (1913), but I have said all I desire to say about that work in my booklet, *Shakespeare's Law and Latin* (Watts & Co., 1916). Mr. Robertson, it will be remembered, is not a lawyer, nor, for that matter, is Sir Sidney Lee.

poet and dramatist was "radically unsound in his interpretation alike of elementary legal principles and of legal procedure"—a fairly sweeping statement—I should require to add yet another volume to the mountainous mass of "Shakespeare" literature, in order to do justice to such a far-reaching and comprehensive subject. Happily, however, Sir Sidney has himself indicated a shorter and easier method of investigation. He has referred to Mr. Charles Allen's chapter on "Bad Law in Shakespeare" as being "especially noteworthy." I propose, therefore, to examine the evidence of our great poet's ignorance of legal principles and procedure so conveniently set before us by this American writer,¹ and vouched for by Sir Sidney Lee, only premising that I decline to accept as examples of Shakespeare's alleged "bad law" instances taken from plays which are, in whole or in part, of very doubtful authorship, such as *Henry VI* (all three parts), *Titus Andronicus*, *Timon of Athens*, and some others. We must confine ourselves to admittedly "Shakespearean" plays.

Here, then, is a "noteworthy" example of Shakespeare's "bad law" according to our legal mentor Mr. Charles Allen (p. 128). In *Love's Labour's Lost* the King addresses his three friends and companions in the following words:—

You three, Biron, Dumain, and Longaville,
Have sworn for three years' term to live with me
My fellow-scholars, and to keep those statutes
That are recorded in this schedule here.

What says Mr. Charles Allen as to this? "A statute imports a legislative act; or, if used here for 'edict,' even an edict stands of its own force, and does not require an oath to support it in order to make it binding. . . . The word seems to be used inaccurately for vows or resolves."

¹ Mr. Charles Allen, now I believe deceased, was a lawyer of some distinction, who practised latterly at Boston.

Now this criticism really appears to me—if one may be allowed to express an honest opinion in plain language—to exhibit such a deficiency both of knowledge and common sense that, in my judgment, it is sufficient of itself to put Mr. Allen's book, so far as it pretends to be an exponent of law and legal principles, altogether out of court. "A statute imports a legislative act"! Mr. Allen, then, had never heard of "Statutes Merchant" and "Statutes Staple." But we may put these aside. He had never heard of the "statutes" of a School or College, or of a Cathedral Chapter! He had never heard of scholars, students, disciples, or teachers being called upon to make oath to keep such statutes! And this is set before us as an example of Shakespeare's "bad law"—save the mark! It is, really, a very melancholy example of the teacher's incompetence to teach.

Let us now see what our legal mentor has to tell us about *The Merchant of Venice*, one of the two plays in which, if we fail to recognize Shakespeare's ignorance both of "elementary legal principles and of legal procedure," we must, according to Sir Sidney Lee, be content to forfeit all claim to be called "judicious" readers. Nay, another Transatlantic lawyer, Mr. Devecmon, of the Maryland Bar, has informed us that in this play the bard of all ages "not only manifests his lack of knowledge of the technique of the legal profession, he shows a profound ignorance of law and of the fundamental principles of justice"! ¹ I am not sure, however, whether Sir Sidney would be altogether ready to subscribe to this astonishing pronouncement. To say that Shakespeare was ignorant of the "fundamental principles of justice" is, perhaps, going rather farther than even he is prepared to go.

But let us hear Mr. Charles Allen on the subject.

¹ "In re Shakespeare's Legal Acquirements," by William C. Devecmon. Publications of the New York Shakespeare Society, No. 12. London, Kegan Paul, 1899. (My italics).

First of all, adverting to the fact that "by the will of Portia's father, all her suitors must submit to the test of the caskets, and if unsuccessful must for ever renounce marriage, he writes: "This testamentary provision in restraint of marriage, with no means of enforcing it, would seem to have been the invention of a story-teller rather than of a lawyer."

Well, the tale of the Caskets certainly was the invention of a story-teller, for, as Sir Israel Gollancz writes, "*The Gesta Romanorum*—Richard Robinson's English version, entitled '*Records of Ancyent Historyes*' (1577)—contains the nearest approximation to the story of 'The Three Caskets' as treated in this play,"¹ and it was well known to English dramatic literature at least as early as 1579. But then this "testamentary provision" was "in restraint of marriage"; so Mr. Charles Allen appears to think that no writer who had any knowledge of law could possibly have introduced this old story into a play!

Then the Trial Scene—let the reader take note of Mr. Allen's destructive criticism as to that.² Why, *inter alia enormia*, Doctor Bellario actually palms off Portia on the Duke of Venice as a young doctor of laws from Rome, who could expound and determine the law of Venice. "Such conduct," says Mr. Allen, "if it were possible under our system, would be good ground of disbarment here"!

Then just see how the trial is conducted. Why, "Portia's rules of law will not bear examination." Amongst other things, "such a condition of a bond (Antonio's) probably would not even at that time have been valid, as it involved a homicide. But if valid, it would be no violation of the condition to cut

¹ "The Temple Shakespeare" Edition, p. ix. See the "Story of the Choice of Three Caskets" from the *Gesta Romanorum*," translated by Richard Robinson, in Payne Collier's "Shakespeare's Library," Vol. ii. p. 102.

² Work cited, p. 113 and following.

off less than a pound of flesh," and so forth and so forth.

So clearly Shakespeare was hopelessly ignorant "alike of elementary legal principles and of legal procedure." Yes, and may we not add, with the learned Mr. Devecmon, "of the fundamental principles of justice" also?

Now I would ask the "judicious reader," what does he think of criticism of this kind? To me I confess it appears to be indicative of an utter dearth not only of critical intelligence, but of ordinary common sense.

What is this delightful play which we all know as *The Merchant of Venice*? First of all let it never be forgotten that it is a *comedy*. Those who saw the late Sir Henry Irving in it could hardly escape from the idea that it was a tragedy. Their sympathies became gradually enlisted in favour of the harassed old Jew, and Shylock became the hero of the piece; and even those who have seen Maurice Moscovitch in the part—to my mind an ideal Shylock—can hardly laugh at the misery of the wretched old man, as, no doubt, audiences in Shakespearean times, to whom Jew-baiting on the stage was a congenial sport, were accustomed to do, or refrain, in spite of his avarice and his cruel desire for vengeance, from extending to him some meed of sympathy in his despair. But this, I take it, arises from the softened humanities of our own times, when we feel that "the quality of mercy is not strained" even when it is extended to such a miserable creature as Shylock.

The play, then, is a "comedy," and must be criticized as a comedy. But the point is that, in the main, it is all taken from the *Pecorone* of Ser Giovanni (Day IV, Novel I). Here we find the Merchant, the Jew, the bond, the pound of flesh, the lady ("of Belmonte") doctor of laws, the episode of the ring, etc., etc., with all of which Shakespeare has made us familiar; and that he followed the old Italian writer very closely is

made manifest by a reference to the original. Take the following as one example. Shylock stipulates for—

an equal pound
Of your fair flesh, to be cut off and taken
In what part of your body pleaseth me.

Ser Giovanni's words are : " Che 'l Giudeo gli potesse levare una libra di carne d'addosso di qualunque luogo e'volesse " ; i.e., " that the Jew might take a pound of flesh from any part of his body he pleased."¹

This, then, is the story which Shakespeare has taken and alchemized in his own marvellous way, transmuting baser metal into purest gold, as he alone knew how, but following closely upon the lines laid down for him by Ser Giovanni's novel ; and because the Jew who " thought to play a trick is tricked himself " ; because he is not only denied his pound of flesh, but done out of his ducats ; because he is mocked and jeered at and made a butt of in the play, as in the novel ; because the dramatist brings in Portia, " the lady of Belmonte," as a doctor of laws, and introduces into his comedy a trial scene very much after the style of the Italian original, therefore we are to be told, forsooth, by a doctrinaire critic that Shakespeare could have had no knowledge of elementary legal principles or procedure, and perhaps not even of the " fundamental principles of justice " !

Is this, I would ask, really to be accepted as the intelligent and enlightened and well-informed Shakespearean criticism of the present day ? For myself I should characterize it by epithets of a very different kind. But perhaps the " judicious reader " will supply them. I assert that such a play as *The Merchant of Venice*, though it gives us proof that the

¹ Ser Giovanni Fiorentino's story, with English translation, is to be found in Payne Collier's " Shakespeare's Library," Vol. ii. p. 65. See also *The Pecorone of Ser Giovanni*, now first translated into English by W. G. Waters, illustrated by E. R. Hughes, R.W.S. (1897).

author of it stands in the supreme rank of dramatists, provides us with no evidence whatever either that he had special knowledge of law, or that he was ignorant of law. A man endowed with the dramatic genius of Shakespeare, even though he were a Lord Chancellor, or a Lord Chief Justice of England, might take an Italian model and fashion upon it such a play, even though all the law and legal procedure therein were wildly discordant when compared with "our system," to which Mr. Allen makes such solemn reference. All his concern would be to make a delightful comedy amid delightful Italian scenery, and, not being a stolid dolt, he would not concern himself a twopenny button-top about the laws of England and the practice of the King's Bench.

If, then, it is deemed "judicious" by our Shakespearean Highbrows of the present day to see in *The Merchant of Venice* a proof that the poet who is "not of an age but for all time" was destitute of all knowledge of "elementary legal principles and legal procedure," I can only pray that I may be found among the injudicious to the end of my allotted time.¹

¹ There is yet another thing that sapient lay critics are apt to forget. It is impossible for the best of lawyers to make a "trial scene" on the stage conform to strict legal procedure. Take, for example, the play called *The Butterfly on the Wheel*, by Mr. E. G. Hemmerde, K.C., where such a scene is introduced. Here a legal critic may find many things said and done which could not have been actually said or done in a real trial by jury, but it would be absurd to say that, therefore, Mr. Hemmerde is ignorant of law. A dramatist is, of course, under the necessity of greatly compressing his "trial scene," otherwise it would, probably, last many hours, and in order to do this he is obliged to depart from the rules of legal procedure. His witnesses, for instance, cannot be examined, cross-examined, and re-examined as they would be in a Court of law, and, amongst other irregularities, "leading questions" are absolutely necessary for him. These things are not "mistakes." They are the result of the necessities of the case.

But what about Antonio's bond? Is it not clear that Shakespeare went wrong here on an elementary point of law? Why, he did not know the distinction between a "single bond" or *simplex obligatio*, and a conditional bond!

Let us examine this, and I think we shall find that the error is not Shakespeare's but that of the learned critics and commentators. What says Mr. Charles Allen? "In *The Merchant of Venice* Shylock says:—

Go with me to a notary, seal me there
Your single bond.

Technically, a single bond was a bond without condition, but Antonio's bond was to have a condition, and therefore it was inaccurately described as a single bond."

Now, in the first place, the Cambridge Editors tell us that the expression a "single bond" may be properly used of a bond without sureties, and so also says Sir Israel Gollancz.¹ But I have no desire to ride off on that explanation, for I propose to show that Antonio's bond was *not* a conditional bond, as that expression is understood by lawyers, but really a "single bond."

"Bonds have usually a condition annexed to them that on the person bound paying so much money, or doing some specified act, the bond shall be void. A bond without a condition is called a single bond."² Again, "a bond is an instrument under seal whereby the party from whom the security is taken obliges himself to pay a certain sum of money to another at a day specified. If this be all, the bond is called a single one (*simplex obligatio*), but there is generally a condition added that if the obligor does, or abstains from doing, some particular act, the obligation shall be void, or else shall remain in full force, and the sum

¹ The "Temple" Edition, Glossary, p. 124.

² *Encyclopaedia of the Laws of England*, vol. ii. p. 334. Art. "Bond" (1906).

mentioned in the obligatory part of the bond is in the nature of a penal sum (or *penalty*), and is usually fixed at much more than is sufficient to cover any possible damage arising from the breach of the condition."¹

A well-known example of a conditional bond is a common recognizance, in which the obligor binds himself to pay a certain sum of money to H.M. the King, the "condition" of the recognizance being that if he is of good behaviour for a certain time the bond becomes void, and no money has to be paid.

Now let us try to apply these legal definitions and examples to Antonio's bond. Antonio bound himself to pay to Shylock a certain sum of money "on such a day, in such a place" (*Merchant of Venice*, i. 3, 147). And what was the "condition" upon the performance of which the bond was to become void? There was no such condition. Antonio binds himself absolutely to pay this certain sum at a certain place on a certain day. True there was a penalty attached if he failed to do so. In that case he was to forfeit a pound of flesh. But that was not a "condition" on the performance of which the bond was to become void. On the contrary, it was a penalty pure and simple, dependent for its effect upon the existence of the bond. If it had been provided by the document that Antonio should enter into an obligation to allow Shylock to cut off a pound of his flesh, "on such a day, in such a place," the "condition" of the bond being that if he paid a certain sum of money at a fixed date then the bond should become void and of no effect, in that case the bond would have been a "conditional" one. But we have only to refer to the passage cited from the play to see that this was not so, for, I repeat, Antonio simply bound himself to *pay the money* at a fixed time and place, without condition or qualification, and, says Shylock, if he did *not* do so—

¹ *Stephen's Comm.*, 11th Edn. (1890), vol. ii. p. 117.

let the forfeit (i.e. the penalty)
 Be nominated for an equal pound
 Of your fair flesh.

And further on he asks :—

If he should break his day, what should I gain
 By the exaction of the forfeiture ?

So that the "obligation" was not to allow the pound of flesh to be cut away ; the "obligation" was to pay the money, subject to the "forfeiture," or penalty, named, which was to be enforced, if the Jew so pleased, upon the obligor's failure to pay as agreed. It is as if A binds himself to pay to B £100 on January 1 at the Royal Exchange, subject to the penalty, on failure so to do, of handing over his motor-car to B. But this is not a bond "with collateral condition." It is a "single bond" with a penalty attached in case of non-payment. It is true that Shylock talks of "such a sum or sums as are expressed in the condition," but "condition" here means nothing more than the bargain, or this particular term of the bargain, and that this is so, and that Shakespeare had not in view a "condition" in the technical sense, is made manifest by a reference to the original Italian from which the story is taken. Here we read : "E perchè gli mancavano dieci milia ducati, andò a un Giudeo a Mestri, e accattogli *con questi patti e condizioni*, che s'egli non glie l'avesse *prenduti dal detto* di a San Giovanni di giugno prossimo a venire, che 'l Giudeo gli potesse levare una libra di carne d'addosso di qualunque luogo e' volesse"—i.e., "As he wanted still ten thousand ducats, he applied to a Jew at Mestri, and borrowed them *on these terms and conditions*, that if they were not repaid on the feast of St. John in the next month of June, the Jew might take a pound of flesh from any part of his body he pleased."

This clearly shows whence the dramatist took the word "condition" which he puts into Shylock's mouth, and that its meaning is only such as I have

explained. It is from not observing this that certain critics, like Mr. Charles Allen, have been misled into charging Shakespeare with "bad law," because he calls Antonio's obligation a "single bond," which in reality it was. If it be objected that such a form of bond is not often met with in our English practice—or "our system," as Mr. Allen calls it—the answer is that in all this story Shakespeare merely follows Ser Giovanni, and the conclusion of the whole matter is that it is the sapient critics, and not the great dramatist, who have been guilty of lamentable error and absurdity concerning both the bond, and the play generally.¹

Quite similar, and open to the same observation, is Mr. Allen's criticism of *Cymbeline*. Here, says he, "the wager upon which Iachimo came to England was grossly immoral, and could never have supported an action at law; but in the play lawful counsel were to be called in to draw covenants which should be valid in law." The answer is that all this story about the wager was taken from Boccaccio, and it is absurd to suppose that Shakespeare, when founding a play on an Italian romance, would trouble himself about the English law concerning wagers *contra bonos mores* and the like. Aye, but Posthumus says to Iachimo, "Let there be covenants drawn between us . . . let us have articles betwixt us," and Iachimo agrees, and says "We will have these things set down by lawful counsel," and such an agreement between these two (entered into at Rome) is adduced by Mr. Allen as evidence of "bad law" and ignorance of legal principles, because according to English law—though *Cymbeline*, it may be remembered, was a British King supposed to have been contemporary with the

¹ Malone, himself a sound lawyer, knew better. He quotes the words "Go with me to a notary, seal me there your single bond" in illustration of Shakespeare's legal knowledge. *Boswell's Malone*, vol. ii. p. 109.

Roman Emperor Augustus—such a contract could not be enforced ! Are we really to regard this as the sort of Shakespearean criticism which is now accepted and endorsed by our pundits of literature ? *Quantula sapientia !*

I now come to an instance of alleged bad law in Shakespeare which has been frequently cited by the critics, and where again I think I shall have no difficulty in showing that it is the critics, and not Shakespeare, who are in error.

“ In *All's Well that Ends Well*,” says Mr. Allen, “ the King of France assumed the power to compel his ward Count Bertram to marry Helena, though Bertram remonstrated against being compelled to marry a poor physician's daughter.” But the law of “ Guardian and Ward ” was that “ the spouse must be of equal rank with the ward,” and Coke on Littleton is quoted to show that “ the lord could not disparage the ward by a *mésalliance*.” Then, says Mr. Allen, “ it is quite clear that Shakespeare overlooked this feature of the law ” ; and here he is supported by Mr. Arthur Underhill, a distinguished conveyancing counsel, who, in *Shakespeare's England* (vol. i. p. 387), writes that Shakespeare had “ ignored ” this condition. Moreover, Lord Campbell himself has a note to the effect that “ it is doubtful whether Bertram, without being liable to any penalty or forfeiture, might not have refused to marry Helena—on the ground that she was not of noble descent,” citing Coke on Littleton as above.¹

I venture to say, however, that Shakespeare had neither “ overlooked ” nor “ ignored ” the condition in question. True “ the spouse must be of equal rank with the ward,” as Mr. Underhill writes, but the King was no ordinary “ guardian.” The King is the fountain of honour, and it was in his power so to ennoble

¹ *Shakespeare's Legal Acquirements* (1859), p. 58.

"the spouse" as to make her "of equal rank with the ward." And this the King of France undertook to do in Helena's case. Harken unto the following :—

King. 'Tis only title thou disdain'st in her, *the which*
I can build up . . .
 If thou canst like this creature as a maid
I can create the rest : virtue and she
 Is her own dower ; *honour* and wealth from me.

Whereupon says Bertram :—

who so ennobled
 Is as't were born so.

And the King, to clinch the matter, adds :—

Take her by the hand,
 And tell her she is thine : *to whom I promise*
A counterpoise : if not to thy estate,
*A balance more replete.*¹

It appears to me that it is the critics who have "overlooked" or "ignored" a very material passage in the play.

But even if it had been otherwise ; if Shakespeare had made a King of France threaten a ward with the results of his displeasure should he refuse to marry a lady whom the King desired him to marry although of inferior rank, what cogency could reasonably be attached to such an incident in a drama, as evidence of ignorance of law on the part of the dramatist ? Very little indeed as it appears to me. Yet this is the only instance cited by Mr. Underhill in support of his assertion that Shakespeare's "knowledge of law was neither profound nor accurate"—an instance which, when carefully examined, has "melted into air, into thin air."

And here I must turn aside for a moment from Mr. Charles Allen in order to say yet another word concerning Mr. Underhill's essay on Shakespeare's Law. This learned writer remarks on Shakespeare's allusions to "fines and recoveries," which, he says, "seemed

¹ Act. ii. Sc. 3.

to Lord Campbell to 'infer profound knowledge of the abstruse law of real property,' but which only seem profound and difficult to lawyers of the nineteenth and twentieth centuries because they have become archaic and unfamiliar." Now to Lord Campbell, at any rate, such expressions as "fines" and "recoveries" would not have seemed either "profound" or "difficult," neither to him would such terms have been "archaic and unfamiliar," seeing that these proceedings were part of our normal legal procedure for upwards of fifty years of his Lordship's life, and that he was himself Solicitor-General when they were abolished by the legislature in the year 1833. Moreover, I cannot find the quotation which Mr. Underhill purports to cite from Lord Campbell in his book on *Shakespeare's Legal Acquirements*.¹ What he does say, with reference to some words quoted by him from the *Comedy of Errors*, is that "they show the author to be very familiar with some of the most abstruse proceedings in English jurisprudence"—a very different thing from "the profound knowledge of the abstruse law of real property."

Lord Campbell further cites the following from *The Merry Wives* :—

Mrs. Ford. What think you? May we, with the warrant of womanhood, and the witness of a good conscience, pursue him with any further revenge?

Mrs. Page. The spirit of wantonness is, sure, scared out of him. If the devil have him not in fee simple, with fine and recovery, he will never, I think, in the way of waste, attempt us again.

¹ Mr. Underhill has kindly written to me that his article was written upwards of ten years ago, and that he cannot now say where he got the words in question, but "must have taken it [the quotation] from some printed source." I think, therefore, there can be no doubt that he took it from some writer who misquoted Lord Campbell. Certainly *he* would not have written such nonsense. See my letter in the *Times Lit. Supp.*, March, 11, 1920.

Here Lord Campbell does not suggest that the mere mention of all these well-known legal terms—*warrant, witness, waste, fee simple, fine and recovery*—is proof of Shakespeare's knowledge of legal principles. All he suggests is that his "head was so full of the recondite terms of the law, that he makes a lady thus pour them out, in a confidential *tête-à-tête* with another lady," and further, that "this Merry Wife of Windsor is supposed to know that the highest estate which the devil could hold in any of his victims was a *fee simple*, strengthened by *fine and recovery*."

Now few lawyers, I take it, of the present day know very much about *finer* and *recoveries*, and laymen, naturally, know nothing at all. Nevertheless we find that certain laymen, though themselves ignorant of law, have of late, with sublime confidence, undertaken to instruct us concerning Shakespeare's legal knowledge, or the want of it; whence it happens that many laughable errors have been solemnly committed to print. One recent lay critic, for example, who desires to show that all Shakespeare's "law" can be easily paralleled by similar legal expressions to be found in other dramatists, though devoid of all legal education, who were the great poet's contemporaries, has cited the word "fine," when used in its ordinary sense of a money-payment, as a parallel to the word as used by Shakespeare in the expression "*fine and recovery*," and the word "recovery" when used of the recovery of a debt, or of the ordinary action for the recovery of land (as distinct from the fictitious suit), as parallel to Shakespeare's usage of the word in the technical sense as above!

Now no lawyer needs to be told that *finer* and *recoveries* were collusive actions employed to bar estates tail, to bar dower, to convey estates of married women, to enable married women to join with their husbands in selling property, and for other purposes known to conveyancers. They differed in their pro-

cedure and in their effects. One "levied" a *fine*, but one "suffered" a *recovery*. The word "fine" in this connection had nothing to do with a money payment. As we read in an ancient record of Parliament, 18 Edward I, "*finis sic vocatur eo quod finis et consummatio omnium placitorum esse debet*"; and, similarly, we read in the statute 27 Edward I, c. i, "*Quia fines in curia nostra levati finem litibus debent imponere, et imponunt et ideo fines vocantur.*"¹

And the supposed parallels to the word "recovery" as used by Shakespeare in conjunction with "fine," are equally ridiculous.

But some sapient critics have objected that Shake-

¹ Mr. Underhill gives us a brief description of a Common Recovery, and adds a word with regard to a *fine* (Work cited, pp. 404-5). I would refer to *Stephen's Comm.*, 8th Edn., i. 564; *Kerr's Blackstone* (1862), vol. ii. 351; and Cruise on *Fines and Recoveries* (3rd Edn., 1794, vol. i. pp. 175, 197-227). Mr. J. M. Robertson, who, as a layman, was not unnaturally ignorant of the meaning of the words "fine" and "recovery" used in their technical sense, has come quite amusingly to grief by finding parallels to them in the use by Dekker and other dramatists contemporary with Shakespeare of the same words in their ordinary signification, as, e.g., in the use of "fine" in its common meaning of a money payment. Thus, after telling the reader that "'Fine,' as it happens, is a common figure in the drama of Shakespeare's day," he quotes from Dekker:—

an easy fine

For which methought I leased away my soul ;
and from Porter:—

Francis, my love's lease I do let to thee,
Date of my life and time ; what say'st thou to me ?
The ent'ring, fine, or income thou must pay.

And actually informs us that, "*There is nothing more technical in the 'Comedy of Errors'!*" (*The Baconian Heresy*, p. 46). This is, of course, ludicrous. See my *Shakespeare's Law and Latin* (Watts & Co., 1916), p. 11 *et seq.* We even find the above absurd error as to the meaning of the word "fine" in *Schmidt's Shakespeare Lexicon* (1874).

speare is inaccurate in speaking of a "fee simple with *fine and recovery*," imagining that both these forms of assurance would not be employed in respect of the same property. They are wrong, as the reader may satisfy himself if he cares to refer to Cruise on *Fines and Recoveries* (3rd Edn. 1794; see vol. ii. pp. 21 and 52). Together these two devices operated to "make assurance doubly sure," and were not unfrequently so used.¹

Let us now return to Mr. Charles Allen and see what further supposed proofs of Shakespeare's "bad law" he has to set before us. He actually finds one in Antony's great speech over the body of the murdered Julius.

Moreover he hath left you all his walks,
His private arbours and new-planted orchards,
On this side Tiber; he hath left them you,
And to your heirs for ever.

But, cries Mr. Allen, "In a devise or dedication of lands to the public, the words 'to your heirs for ever' are misplaced, as they would imply individual ownership, instead of a right vested in that indefinite body the public." These words, he says, are not to be found in any other account of Cæsar's Will, "and they were probably added by Shakespeare, who either did not know or overlooked their inappropriateness in a devise of this kind."

It is difficult to speak with due restraint of such criticism as this. "*Their inappropriateness*"! Good Heavens! Whether or not Shakespeare was a lawyer he was certainly a dramatist, and the best of all dramatists. And could anybody with a spark of

¹ Malone tells us of a deed of June 2, 1647, "to lead the uses of a fine and recovery of our poet's estate, then in the possession of his eldest daughter, Susanna Hall." *Boswell's Malone* (1821), vol. ii. pp. 116-7.

dramatic instinct, anybody but a hide-bound pedant, fail to see how splendidly those words, "and to your heirs for ever," ring out for the ears of the populace? They may be "inappropriate" for an indenture, but Antony was no lawyer, and he was not drafting a deed. Neither was Shakespeare, whether lawyer or not, such a poor dramatist as to make a great orator, speaking to rouse the passions of a Roman mob, talk in the technical language of a conveyancer.

And this is solemnly put before us as an example of Shakespeare's "bad law," and our literary pastors and masters commend it to us as "especially noteworthy" criticism! Yes, noteworthy it is indeed.

Here is another example: In *Coriolanus*, Sicinius says:—

He hath resisted law,
And therefore law shall scorn him further trial
Than the severity of the public power
Which he so sets at naught.

But, comments Mr. Allen, "Resisting law was no legal reason for denying him a trial"!

Now it is curious that Mr. Rushton, himself a learned lawyer, has quoted this very passage, amongst others cited by him, to illustrate Shakespeare's familiarity with legal maxims. In connection with the above-quoted words from *Coriolanus* (Act iii. 1) he refers to the maxim, "Merito beneficium legis amittit, qui legem ipsam subvertere intendit" (2 Inst. 53), and notes that, in accordance therewith, "Coriolanus had resisted law and therefore lost the benefit of the law."¹

And after all, as Mr. Allen notes, "it was finally decided to proceed regularly by process." Really such solemn trifling is but waste of the reader's time.

Again, Mr. Allen takes objection to the use of the word "demise" in the following passage from *King Richard III*:—

¹ *Shakespeare's Legal Maxims* (1907), p. 58.

Tell me, what state, what dignity, what honour
Canst thou demise to any child of mine ? (iv. 4, 247.)

Here he says the word "seems to be used not only in an untechnical, but in an unusual sense."

Now the first comment to be made on this is that the words in question are spoken by the Queen Elizabeth, and I am not aware that it has ever been asserted even by the most zealous advocate of the "legalist" Shakespearean School, that Shakespeare was not only such a hide-bound lawyer, but also so wanting in dramatic propriety as to make his ladies use legal expressions with the accuracy of the trained lawyer. He does, indeed, as we have already seen, sometimes put a string of well-known legal expressions, such as "fines" and "recoveries" and the like, into a woman's mouth, but that is, of course a very different thing from making women speak, in serious conversation, in the technical language of the lawyer. This is the answer to another objection taken by Mr. Allen, viz. : that "In *As You Like It*, Celia, in speaking of her own father, says to Rosalind, 'And, truly, when he dies, thou shalt be his heir,' meaning that she herself would share her inheritance with Rosalind," where, says Mr. Allen, "this use of the word appears to be not only untechnical but unique."

Is he then prepared to argue that if Shakespeare had really possessed an adequate knowledge of law (which, of course, he denies) he would have sacrificed his dramatic art to legal propriety, and made his ladies speak with the technical accuracy of the law-student ? If *not*, objections of this nature are but fond things vainly invented.

But to come back to this use of the word "demise." To "demise" means to "convey," "transfer," or "grant." To apply it to a "dignity" or "honour" may be unusual, but, certainly, it cannot be called an example of "bad law." Moreover, the Queen is right, *prima facie* at any rate, when she suggests to

Richard that he has no power to "demise" any dignity or honour to a child of hers, for, as *Comyn's Digest* informs us, "a dignity or nobility cannot be aliened or transferred to another." Nevertheless there was an exception. It *was* possible for Richard to "demise" such dignities or honours, inasmuch as he was King, and even a subject could make a grant of such things "with the King's licence."

And here I must give another alleged example of Shakespeare's "bad law," again to be found (as it is said) in the utterance of a Queen, which, although it is not cited by Mr. Charles Allen, is so full of interest and instruction for Shakespearean critics and students that it cannot be left out of the account.

Queen Katherine, in *Henry VIII* (Act ii. 4), says to Wolsey :—

I do believe,
Induced by potent circumstances, that
You are my enemy, and make my challenge.
You shall not be my judge.

Whereupon say certain critics, lay and legal—Mr. Devecmon of the Maryland Bar is one of them, and I quote his words: "To 'challenge' is to object or except to those who are returned to act as *jurors*, either individually or collectively as a body. The judge was not subject to challenge." This, therefore, is yet another instance of "bad law" on Shakespeare's part.

Now, here I should have thought it was sufficient to reply that "challenge" was constantly used in the sense of "objection"; and that, even though the poet might have had the legal significance in his mind, it certainly does not argue the absence of legal training on his part that Katherine should apply, by a very natural analogy, to one of the two Cardinals who were to act as judges in her case (but subject to the supreme tribunal of the Pope, the real judge), a term which in strict legal usage is properly applicable to a

juror only ; and here again I might comment on the curious idea that a dramatist cannot be a lawyer unless he makes his ladies and laymen speak in the language that a trained lawyer would employ.

But there is much more than this to be said. These critics have forgotten that the question of Katherine's divorce was to be tried not in one of the Temporal Courts, but in an Ecclesiastical Court ; and here an objection might be taken by the defendant on the ground that the judge was a "suspect" person (*iudex potest ut suspectus recusari*) for certain just causes which may be found set forth in the *Corpus Juris Canonici*, and the Decretals of Gregory IX. Katherine, therefore, acted strictly within her rights in challenging Wolsey ("challenge" here standing for "recusare"—"I do refuse you for my judge"), because she believed him to be her enemy. Wolsey, however, denies the accusation, tells the Queen to put such notions away from her, and will not admit the objection. This was provided for by the Canon Law : *quod si iustam recusationis causam noluit admittere delegatus . . . a tali gravamine licite potuit ad nostram audientiam appellare*. Agreeably with this Katherine makes her appeal :—

I do refuse you for my judge, and here,
Before you all, appeal unto the Pope
To bring my whole cause 'fore his holiness,
And to be judged by him.

Katherine, it seems, follows the correct procedure throughout, except that, perhaps, the more regular course would have been to let her proctors act for her in making her challenge and raising her appeal, but that would have led to the sacrifice of one of the most dramatic incidents of the play.

There seems, then, to be no doubt that the author of this part of *King Henry VIII* was acquainted with the correct procedure of the ecclesiastical courts, and

has stated it accurately in this scene, and, therefore, that this passage, instead of being an example of Shakespeare's legal nescience, is, on the contrary, a very remarkable proof of his exceptional legal knowledge. One could hardly find a more instructive example of the dangers that lie in wait, not only for the layman, but for the lawyer himself, unless he be equipped with a very thorough all-round legal training, when he essays to criticize Shakespeare's use of legal terms.¹

All this is, I think, instructive and illuminating, but I have to admit that, so far as I am concerned, it is *ex abundanti* on the matter of Shakespeare's legal knowledge, because, in my humble judgment, it has now been proved that so much of *Henry VIII* as was not written by Fletcher was the work of Massinger, who wrote in collaboration with him.²

It now only remains to say a word concerning *Measure for Measure*, the second of the two plays, in which, according to Sir Sidney Lee, "no judicious reader can fail to detect" Shakespeare's ignorance "alike of elementary legal principles and of legal procedure." Let us see, then, what Mr. Charles

¹ Mr. W. W. Graham, British Vice-Consul at Durango, Mexico, writes to me that "Under the old Spanish Code either party to a suit has the right to '*recusar*,' i.e., '*challenge*' the judge on eleven different grounds, of which No. 9 is that he has previously interested himself or expressed an opinion on the case pending. This right is frequently exercised in Mexican law to-day. The Queen, true to her character as a Spanish lady, twice 'refuses' Wolsey as judge, an almost literal translation of '*recusar*.' Surely this is one more proof that the Great Unknown was posted on Spanish law as well as on English"!

² See *Sidelights on Shakespeare*, by H. Dugdale Sykes. (The Shakespeare Head Press, Stratford-upon-Avon, 1919.) It was, of course, Mr. James Spedding who offered proof that a great part of the play, including Wolsey's and Buckingham's speeches, was written by Fletcher, an opinion which has met with general acceptance.

Allen, to whom Sir Sidney refers us for legal light and leading, has to say concerning this play.

"In *Measure for Measure*," writes this critic, "Claudio was condemned to death for an assumed offence of which he was legally innocent. . . . Claudio had taken Juliet for his wife, *per verba de praesenti*. According to the law in Shakespeare's time, cohabitation after such a pre-contract of marriage was not a crime." Here, then, is a flagrant instance of "Bad law in Shakespeare."

But let us examine this case a little further. There can be no doubt that Shakespeare based his play of *Measure for Measure* upon George Whetstone's drama of *Promos and Cassandra* (1578), and the prose version of the same story which Whetstone included in his *Heptameron of Civil Discourses* published in 1582.¹ Here we find that the scene is laid at Julio in Hungary, where Lord Promos (Shakespeare's Angelo) has been appointed lieutenant, or "deputy," by Corvinus, the King of Hungary and Bohemia. In this city we are told there was a "statute," which had been allowed to go into disuse, but which was "revived" by Promos, whereby incontinence was made a crime punishable by death. Under this statute Andrugio (Claudio), who, "by the yeelding favour of fayre Polina" (Juliet), had "trespassed against this ordinaunce," although he "onlye sinned through love, and never ment but with marriage to make amendes," was sentenced to be executed. We need not further follow the plot except to say that Promos, giving way to unlawful passion inspired by Andrugio's sister Cassandra—who, unlike Isabella, is induced to sacrifice herself in order to save her brother's life—becomes, like Angelo, himself guilty of the capital offence.

Now in Shakespeare's play the scene is laid in Vienna, and here, as in Whetstone's play, we find there was an old statute, which had been "let slip,"

¹ See Payne Collier's "Shakespeare's Library," vol. ii. p. 50.

i.e., disused, for "fourteen years" (Act i. 3, 21),¹ under which the penalty of death was decreed against those guilty of unlawful love—a statute the existence of which Mr. Allen strangely omits to mention.

It is true that Shakespeare complicates matters by introducing the doctrine of "pre-contract," and by assuming the existence of two such "pre-contracts," one in the case of Claudio and Juliet, and another in the case of Angelo and Mariana, and seeing that "according to the law [of England] in Shakespeare's time," such a "pre-contract" *per verba de praesenti* was sufficient to constitute legal marriage, Mr. Allen apparently considered himself justified in saying that Claudio was "legally innocent" of any offence, for "Claudio had taken Juliet for his wife, *per verba de praesenti*," as appears from Act i. Sc. 2, 149, and following lines. It is clear, however, that, in the assumed circumstances of Shakespeare's play, such a "pre-contract" was of itself no defence to a charge under the "statute," which required "the denunciation of outward order," i.e., a solemn ceremony of marriage, before intimacy could be legalized. This plainly appears from the fact that Claudio himself nowhere contends that he is not guilty under the terms of the "statute"; he only complains that he is to be made amenable under a "drowsy and neglected act"; nor is there any suggestion made by any of the characters in the play that his sentence was illegal. And if it had been so, why, we may ask, did not the Duke, as soon as he began to take interest in the affairs of the persons concerned, at once quash Angelo's illegal sentence? ²

¹ "The law hath not been dead, though it hath slept," says Angelo (Act ii, 2, 90), whereupon Mr. Rushton suggests that Shakespeare had in mind the legal maxim "*Dormiunt aliquando leges, moriuntur nunquam.*"

² I find it difficult, therefore, to subscribe to Mr. Underhill's statement that "Angelo's condemnation of Claudio

So far all is plain sailing, but when we come to consider Angelo's case we are confronted with no little difficulty. Angelo himself was bound to Mariana by a "pre-contract" *per verba de praesenti*. Mr. Allen, indeed, suggests that this pre-contract "was perhaps merely *per verba de futuro*, a mere executory contract to marry in the future," but there is no warrant whatever for such a suggestion, as is made manifest by Act iv. Sc. 1. 72, where the Duke says to Mariana, with reference to Angelo, "He is your husband by a pre-contract," clearly showing that such pre-contract was *per verba de praesenti*. But here comes the difficulty. The Duke counsels Mariana, counterfeiting Isabella under the cover of darkness, to have marital relations with Angelo; for, says he:—

He is your husband on a pre-contract.
To bring you thus together, 'tis no sin,
Sith that the justice of your title to him
Doth flourish [i.e., adorn, or justify] the deceit.

But these words might equally have been applied to Claudio, who was Juliet's "husband on a pre-contract," and yet held guilty of a capital offence under the statute. And that the ceremony of marriage was necessary in order to legalize the union of Angelo and Mariana appears by Act v. Sc. 1. 380, where the Duke asks Angelo, with reference to Mariana:—

for alleged fornication was, and was intended by Shakespeare to be, absolutely tyrannical and illegal" (*Shakespeare's England*, vol. i. p. 408). Mr. Underhill (who, however, does not suggest any "bad law" on Shakespeare's part here) appears to have ignored the existence of the "statute." Angelo, it may be noticed, styles Juliet a "fornicatress," in spite of the pre-contract (Act ii. 2, 24), and it seems that he was justified in so calling her, since the poet evidently requires us to assume that the pre-contract alone was not sufficient to give validity to the marriage, or to exempt her and her lover from the provisions of the statute.

Say, wast thou e'er contracted to this woman?

and upon his answering, "I was, my lord," enjoins him to "take her hence, and marry her instantly."

It would really seem, then, that in advising Mariana to counterfeit Isabella, as before mentioned, the Duke was counselling her to break the law as laid down by the statute.

This is not a little puzzling, but perhaps all we can say is that Shakespeare, for the purposes of his drama, was content to be inconsistent, and that that part of his plot which relates to the "statute," and that which relates to the "pre-contract," cannot be made to harmonize. But evidence of legal nescience there is really none, and Mr. Allen himself, though he cites this play under the heading of "Bad Law in Shakespeare," does not actually accuse the dramatist of any legal blunder here, for he is good enough to tell us that "it is quite probable, morally certain indeed, that Shakespeare himself knew the law in respect to such pre-contracts . . . but in *Measure for Measure* for dramatic purposes he chose to ignore it."¹ He adds, "a mere playwright might thus trifle with the law, but the future Lord High Chancellor of England would have been less likely to do so"! But, really, we are not out to discuss the "Baconian" hypothesis. The simple question is whether Shakespeare has in *Measure for Measure*, as Sir Sidney Lee says, provided us with such a flagrant example of "radical unsoundness in his interpretation alike of elementary legal principles and of legal procedure" that "no judicious reader" can fail to detect it. I would earnestly commend this sad case to the "judicious" student of Shakespearean criticism.

¹ Lord Campbell certainly knew the law with regard to "pre-contracts," though he says nothing on the subject with reference to *Measure for Measure*. See his learned judgment in the *Queen v. Millis*, 10 Clark & Finnelly (1st Series), p. 534, which is a *locus classicus* on the subject. See pp. 763, 784.

But, here again, there is yet more to be said. Mr. Allen quotes from this same play of *Measure for Measure* the following words :—

For his possessions,
Although by confiscation they are ours,
We do instate and widow you withal,
To buy you a better husband.

And his comment is that no similar use of the word “widow” as a verb, “meaning to give the right of a widow, is known either in law or elsewhere.”

Now this statement as to the peculiar use of the word “widow” may be, as far as I know, correct, but it is curious that in the *Literary Supplement* to the *Contemporary Review* of November, 1911, the writer of an interesting article on “Shakespeare and the Law of Marriage,” whose name is not given, but who speaks of himself as “a lawyer,” quotes this very passage from *Measure for Measure*, in order to show that Shakespeare here makes a “correct statement of the law” in a matter where “the law itself was, one would think, too complicated and unusual in practice for a layman to have known.” The point is that “if a tenant in chivalry committed a felony, this affected his holding, and an escheat to the lord *propter delictum tenentis* followed. But a felony was an offence against the State, and so the Crown claimed the escheat or forfeiture. But the Crown was compelled to surrender this right by Magna Charta, though it managed to retain it in the case of high treason, and to this day, in the case of an outlawry upon an indictment for treason, the traitor’s land is forfeited to the Crown. But what about the rights of the widow, whether the escheat is to the lord or the Crown? . . . The widow had larger rights in her estate of dower than even the heir, for she was absolutely secured against any form of alienation by the owner. Yet

Shakespeare makes the Duke declare that, in this case, she had no rights ; and he was correct, for the law had been finally settled that way not so very long before Shakespeare's time. Up to the reign of Edward VI the widow was not protected against escheat for felony or treason ; but in 1549 it was settled by statute that escheat in the case of felony did not affect the widow's right of dower, though in the case of high or petit treason the dower was extinguished, thus confirming, in the case of treason, the old law, not only that no heir born before or after the felony could take the escheated property, but that every gift (including dower) made in the felon's lifetime was bad. So Mariana would not have been entitled to dower unless the Duke had relinquished his rights."

The learned writer finds it difficult to suppose that Shakespeare, as a layman, although he has (possibly "by accident"!) correctly stated the law in the passage cited, "was familiar with this particular obscurity in the law of treason" ; but he adds, "On the other hand, the play teems with legal references and correct statements of law, and it is dangerous to dogmatize as to the extent of Shakespeare's legal knowledge."

Alas, it is clear that the writer of this article, though, doubtless, an able and experienced lawyer, could not have been a "judicious reader" !

I have now examined all Mr. Allen's instances of Shakespeare's "bad law" which appear to me worthy of any consideration, and as I venture to submit, I have shown that his case has entirely broken down. *In tenuem evanuit auram*. Lord Campbell may have "greatly exaggerated Shakespeare's legal knowledge," and I certainly should not like to base upon his book a case for such legal learning on Shakespeare's part that "there can neither be demurrer, nor bill of exceptions, nor writ of error" to the law as he makes

reference to, or "expounds it."¹ But the examples which Mr. Allen parades before us, when properly examined, entirely fail to disprove the proposition that the great dramatist had exceptional knowledge "of legal principles and legal procedure." Whether that proposition can be established by an examination of the plays and poems of Shakespeare conducted by a competent and impartial critic it is not for me to say, but, in view of all the wrangling and contention there has been on this interesting question it is, I submit, very desirable that such an examination should be undertaken, and the whole matter re-considered *ab initio*, if only that competent and impartial critic can be discovered, and be willing to undertake the task. If such there be I will venture to tender him some advice before he enters upon the inquiry.

In the first place it is evident that he must be a lawyer, and "a ripe and good one." It is absurd to suppose that a man who has had no legal training is competent to pronounce upon Shakespeare's knowledge or ignorance of "legal principles and legal procedure." He must also be learned not only in the law of to-day, but in the law, and the practice of the law, civil, criminal, and ecclesiastical, as known to the lawyers of Elizabethan times.

Secondly, he should confine his investigations to the plays that are generally admitted to be Shakespearean. I would exclude from the inquiry such plays as (e.g.) *Titus Andronicus*, *Henry VI* (all three

¹ Lord Campbell was himself guilty of mistakes in law, as when commenting on the words "I give unto my wife my second-best bed," in Shakespeare's will, he writes "the subject of this magnificent gift being only personal property, he shows his technical skill by omitting the word *devise*, which he had used in disposing of his realty"; for, as Mr. Rushton points out, in Shakespeare's day "the words *devise* and *bequeath* were applied indifferently to both real and personal property." *Shakespeare's Testamentary Language* (1869), pp. 23 and 49.

parts), *Timon of Athens*, *Pericles*, *The Taming of the Shrew*, *Henry VIII*, and, possibly, *Troilus and Cressida* (in part at any rate) as well.

Thirdly, he must, when adducing legal terms used by other poets and dramatists, contemporaneous with Shakespeare (in order to consider the question whether these others also do not, as some contend, give proof of legal knowledge as great as that to be found in the Shakespearean plays and poems), strictly limit himself to such writers as had, so far as is known, no special legal education. For the question being whether Shakespeare shows by his writings that he had an exceptional knowledge of law, and must, therefore, have received some legal training, it is obviously otiose to quote, in this connection, passages from such writers as Middleton, Donne, Beaumont, Marston, Ford, and others, who, as we know, had studied law.

If, then, such an investigation should some day be undertaken by such a competent and impartial lawyer, or, I would rather say, by a special committee of lawyers so qualified—a consummation devoutly to be wished, but hardly to be hoped for—I venture very gravely to doubt whether they would be found in agreement with Sir Sidney Lee's assertion that "the poet's legal knowledge is a mingled skein of accuracy and inaccuracy, and the errors are far too numerous and important to justify on sober inquiry the plea of technical knowledge," or with Mr. Arthur Underhill's pronouncement that "Shakespeare's knowledge of law was neither profound nor accurate." On the contrary, I think that they would dissent altogether from any such judgment on the question of "Shakespeare's Law." But until that investigation can be made the "judicious" critic must, I apprehend, be content to say, whatever his own opinion may be, *adhuc sub iudice lis est*.

GEORGE GREENWOOD.

FINAL NOTE

IT is impossible not to take note of the curious change which has of late manifested itself in orthodox criticism with regard to Shakespeare's law. As we have seen, the earlier critics, including lawyers like Malone and Lord Campbell, appeared to entertain no doubt that Shakespeare's works evinced such an exceptional knowledge of law that their author must, somewhere and somehow, have received a certain amount of technical training. Just to give another example of the opinion which prevailed on this matter till about the beginning of the present century, I may cite a little book which lies before me by a Barrister, who dedicates his work to the late Lord Hatherley, then Lord Chancellor (*Was Shakespeare a Lawyer?* by "H. T." Longmans, 1871).

The author, who appears to be a lawyer of some distinction, asserts with confidence that "any practising lawyer, who had *attentively* studied the Plays, would feel satisfied" that nothing less than some technical training would "account for the perpetual and abundant crop of legal lore which bristles over the productions of Shakespeare's mind." And we have already seen that Sir Sidney Lee, in the earlier editions of his *Life of Shakespeare*, refers to the poet's "accurate use of legal terms which deserves all the attention that has been paid to it."

Now, however, we see that a marked change has come over the spirit of the critical dream. Shakespeare's legal knowledge, so far from being exceptional, is but "a mingled skein of accuracy and inaccuracy; the errors are numerous and important." Shakespeare displays "a radical unsoundness in his interpretation alike of elementary legal principles and of legal procedure."

Now, in the meantime it had been asked by certain

audacious sceptics, how came it about that William Shakspeare of Stratford had acquired all the exceptional knowledge of law that the earlier critics—lawyers and laymen alike—had attributed to him? When, where, and how had he obtained it? The theory that he had once been an Attorney's clerk had not a scintilla of evidence to support it, and, for many reasons, seemed wildly improbable. How, then, to account for Shakespeare's law? Was it possible that the name "Shakespeare" stood, not for Shakspeare of Stratford, but for some other in whose case the hypothesis of a legal training presented no difficulty?

Then at once the alarum sounded in the orthodox camps. The note of criticism was changed. What? Shakespeare evinces an exceptional knowledge of law? Nonsense. Those old critics and commentators were all absurdly wrong. We know better now. The layman of to-day is more competent to decide this question than old lawyers like Malone, or Campbell, or Rushton, or Grant White, or Judge Webb, or Lord Penzance, *et hoc genus omne*. Go to. Shakespeare had no more legal knowledge than any other dramatist of his day, in fact not so much. Shakespeare was no more learned in the law than he was learned in Latin, or, in fact, in anything else. So *that* difficulty is happily disposed of. *Nous avons changé tout cela. Magna est Falsitas et praevalabit.*



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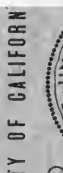
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